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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.
No. 461

MICHAEL GLENN, a minor, by and through his Guardian *ad Litem*, IDA MAE GLENN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Michael Glenn, a minor, through his Guardian *ad Litem,* Ida Mae Glenn, appellee in the court below, respectfully petitions the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled action.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 231 F. 2d 392.

The opinion of the District Court for the Southern District of California is reported at 129 Fed. Supp. 914.

Grounds for Jurisdiction.

(1) The judgment of the Court of Appeals for the Ninth Circuit was made and entered on March 20, 1956.

(2) Appellee's petition for rehearing, filed within thirty days thereafter, was denied on May 25, 1956.

(3) Application for Extension of Time Within Which to File Petition for Writ of Certiorari was filed by Petitioner with this Court on August 23, 1956, and Order Extending Time to File Petition for Writ of Certiorari to October 8, 1956 was made by Honorable Harold H. Burton, Associate Justice, on August 23, 1956.

(4) Jurisdiction of this Court to review by Certiorari the judgment of the Court below is conferred by 26 U. S. C. 1254 (1).

Question Presented.

The Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been but should be settled by the Court, namely:

> Should the two-year statute of limitations for asserting tort claims against the United States be tolled during the legal disability of the plaintiff.

The United States District Court for the Southern District of California held the two-year period of limitations was tolled during the disability (infancy) of the plaintiff herein. The Court of Appeals, by a divided court, reversed.

Statute Involved.

28 U. S. C. 2401:

"Time for commencing action against the United States.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1.000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

Statement of the Case.

Michael Glenn was born on December 5, 1949 at the United States Naval Air Station Hospital, Seattle, Washington, the son of a serviceman. The doctors, nurses and attendants attending and caring for him and his mother were employees of the United States acting within the

course and scope of their employment. [R. 52-6.] On November 12, 1953 said minor, by his mother as Guardian *ad Litem*, sued the United States under the Federal Tort Claims Act, alleging that through the negligence and carelessness of the doctors, nurses and attendants attending and caring for him Michael had been dropped on his head at the time of his birth and as a consequence had suffered serious permanent injuries. [R. 3-8, 17-23.] The United States denied that Michael had been dropped and that any negligence had occurred. [R. 27-28.] After extensive investigation by both parties, plaintiff and defendant, with the consent and approval of the trial court, entered into a stipulation that plaintiff should have judgment for $7500 subject to the right of defendant to assert the defense of the statute of limitations to said action and to appeal from any adverse decision of the trial court on that issue. [R. 52-56.]

Defendant's motion to dismiss on the grounds the action, having been brought almost four years after the claim arose, was barred by 28 U. S. C. 2401(b), was denied by the trial court, which made findings of fact and conclusions of law that the action was not barred by 28 U. S. C. 2401(b), [R. 72-74] and entered judgment for plaintiff in the amount of $7500 [R. 75-6] accompanied by a Memorandum of Decision [R. 58-71.] Defendant appealed to the Court of Appeals which reversed on the grounds the action was barred by 28 U. S. C. 2401(b), one judge dissenting.

Jurisdiction of District Court.

The jurisdiction of the District Court to hear and decide the within case was based upon 28 U. S. C. 1346(b).

ARGUMENT.

The present case presents an important question of federal law which has not been but should be decided by this Court. The majority opinion of the Court of Appeals does not fully or adequately consider the issues raised by the question presented, which issues were presented at length in Appellee's Brief and are set forth and discussed below.

I.

Section 2401 Provides That the Time Limitations on All Actions Against the Government Are Tolled During Legal Disability.

A. A provision for tolling the statute of limitations in actions against the government during the legal disability of the claimant was initially contained in 28 U. S. C. (1946 ed.) 41(20), derived from section 24(20) of the Judiciary Act of 1911, 36 Stat. 1093, and section 2 of the Tucker Act (1887), 24 Stat. 505. This section set forth a general six-year period of limitation for suits against the government, subject to the provision that said period of limitations was tolled during the disability of married women, minors, persons of unsound mind, and persons beyond the seas, and for a period of three years after the disability ceased. At the time of this enactment no tort claims were permitted against the United States, and the statute therefore, in express terms, applied only to contract actions against the government.

B. In 1946 Congress passed the Federal Tort Claims Act (Legislative Reorganization Act, Title IV, 60 Stat. 842) permitting tort claims against the Government, and provided therein a "statute of limitations" of one year for the assertion of such claims. (28 U. S. C. (1946 Ed.)

942). No express reference was made in said legislation to the matter of tolling the period of limitations during legal disability, although the statute did provide that the United States should be liable "in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) We do not know why an express provision for tolling the statute during legal disability was not included in the Act. Presumably Congress assumed that such a fundamental principle of fairness, deeply inbedded in Anglo-American jurisprudence (see *Sims v. Everhardt*, 102 U. S. 300, 309-310), would be given effect by the courts. (See argument under II, *infra.)* Nor do we know what sentiment arose in Congress during the two years following enactment of the statute for express inclusion of such a provision therein.

C. We do know, however, that as part of a general revision of the Judicial Code in 1948 Congress repealed both section 41(20) and section 942 of Title 28 of the United States Code and enacted a single new section, 28 U. S. C. 2401, which sets forth the time limitations for bringing actions against the Government and provides for the tolling of such time limitations during periods of legal disability of the claimant. This new section does not consist merely of the old sections 41(20) and 942 placed together in one location. On the contrary, section 2401 contains new language which differs in material respects from the language of the old sections. Subsection (a) of the new section provides for a general six-year statute of limitations on all actions brought against the government, without restrictions as to the type of action, whether contract or tort, and said subsection further provides that persons under a legal disability may assert

their action within three years after the disability ceases —again without restriction as to the type of action, whether contract or tort. Subsection (b) of the new section provides a two-year period of limitations for filing suit on tort claims exceeding $1,000 and for making written claim to the appropriate federal agency on tort claims not exceeding $1,000. (In 1949 the section was amended to increase the period of limitations on tort claims from one year to two years. (63 Stats. 62.))

D. Did Congress by the enactment of this new section make express provision for tolling the statute of limitations in favor of persons under a legal disability as to *all* actions against the government, both contract and tort? The meaning of the language of the section indicates this was done, and of course "the words by which the legislature undertook to give expression to its wishes" offer the best evidence of what was intended by the enactment. *(United States v. American Trucking Ass'ns,* 310 U. S. 534, 543-544.)

(1) The second sentence of subsection (a) of 2401 provides that *"the action* of *any person* under legal disability or beyond the seas at the time *the claim* accrues may be commenced within three years after the disability ceases." (Emphasis added.) Nothing in this sentence or in the sentence which precedes it limits its application to contract actions. The plain meaning of the sentence is that it applies to *all* actions against the government whether contract or tort. This conclusion is reinforced by the fact that the phraseology of the old section 41(20), which did expressly limit the application of its disability provision to contract actions, was abandoned in the drafting of the new section, so that the provision as to disability in the new section refers to "the action

of any person" without restriction as to the type or category of the action.

(2) Nor should the application of the disability provision in the new section be confined to contract actions because the provision is placed in subsection (a) of 2401 while the period of limitation as to tort claims is covered in subsection (b). Whatever the source of subsection (a) it is not, according to its terms, confined to contract actions. The first sentence of said subsection provides that *"Every civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." (Emphasis added.) "Every civil action" means every action, contract or tort. In this respect also the language of the section is materially different from the old section 41(20) which confined the six-year period of limitations to contract actions brought pursuant to that section.

Thus, subsection (a) of the new section provides for a general period of limitations on all actions against the government, contract or tort, of six years, and for a tolling of the limitation period *on all actions* in favor of persons under a legal disability until three years after the disability has been removed. Subsection (b) then specifically provides a shorter period of limitations for tort claims against the government, thereby setting up an exception to the general six-year limitation period of subsection (a). There is nothing, however, in the exception contained in subsection (b) which states in any way that the disability provision in the second sentence of subsection (a) does not apply to tort claims, and as an exception, subsection (b) should be limited to its terms. It must be kept in mind that these two subsections are merely paragraphs of a single section, enacted under a single

heading, and said section and each part thereof should be construed and given effect as a unit, in preference to treating each subsection as a separate and distinct section, complete in itself, as the Court of Appeals in effect does.

(3) Thus it appears that reasonably interpreted the language of section 2401 says in effect: There is a general six-year statute of limitations on all actions, contract or tort, brought against the government; the period of limitations on all actions, contract or tort, is tolled in favor of a person under a legal disability until 3 years after the disability is removed; provided, however, that as to tort claims asserted against the government the period of limitations shall be two years.

(4) This reasonable construction of the plain language of the statute is not contradicted by the Reviser's Notes. (28 U. S. C. A. foll. 2401.) These notes in effect simply point out the changes in language which have been made in section 2401 as compared to the old sections 41(20) and 942. In referring to such change of language, moreover, the Notes in two instances state "See Reviser's Note under section 2501 of this title." Section 2501 contains similar provisions with regard to the period of limitations on actions brought in the Court of Claims, and the Reviser's Notes under that section state in part:

> "The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use of the general language substituted.
>
> "Words 'nor shall any of the said disabilities operate cumulatively' were omitted, in view of the elimination of the reference to specific disabilities. *Also, persons under legal disability could not sue, and their suits should not be barred until they become able to sue.*" (28 U. S. C. A. foll. 2405. Emphasis added.)

This quotation from the Reviser's Notes clearly enunciates a policy that suits by all persons not able to sue because of a legal disability should not be barred until they become able to sue. Since the Notes under section 2401 make specific reference to this statement, it appears that the same policy motivated the enactment of section 2401 and that section should be interpreted accordingly.

(5) It has been argued by defendant that if the disability provision of section 2401 is held to apply to tort claims a claimant under a legal disability will be given a longer period after the removal of the disability in which to bring suit (3 years) than the initial period of limitations on tort actions (2 years). This is not sufficient grounds, however, for disregarding the express language of the section. The explanation would appear to be simply that Congress chose to utilize the same general disability clause for all actions, contract and tort. The omission to provide that the period of limitations should end two years after the removal of the disability with respect to tort actions may have been an oversight on the part of the drafters or it may reflect a policy of giving persons under a disability a somewhat longer period in which to bring their case after removal of the disability, but whatever the explanation the express provision of the statute should control.

II.

The Time Limitation of Section 2401(b) Is a "Statute of Limitations" Which Under Federal Law Is Tolled During Legal Disability.

A. The Federal Courts in a number of cases have held that statutes of limitations are ordinarily tolled during the time plaintiff is prevented from suing because of legal disability or fraud of the defendant, even in the absence of express provision to this effect. The same cases further hold, however, that if the time limit for bringing suit constitutes a "substantive condition" of the right created by the statute in which it is set forth, rather than a "statute of limitations," then suit must be brought within that time period without regard to legal disabilities or fraud. (*Sgambati v. United States*, 172 F. 2d 297; *Osbourne v. United States*, 164 F. 2d 767, 768; *Wahlgren v. Standard Oil Company*, 42 Fed. Supp. 992; *Kalil v. United States*, 107 Fed. Supp. 966; *Frabutt v. New York C. & St. L. R. Co.*, 84 Fed. Supp. 460; *Damiano v. Penn. R. Co.*, 161 F. 2d 534. See *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253.) These cases include actions brought against the United States Government.

1. As indicated by the above cases a statute of limitations must be differentiated from a statute in which the time fixed for bringing the action is treated as an inherent part of the right created by the statute. As stated in 34 *Am. Jur.* 16:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of

> action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unkown to the common law, and fixes the time within which that action may be commenced, *is not a statute of limitations.* It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."
>
> (Emphasis added.)

In the above cited cases the time periods for bringing suit under the Federal Employers Liability Act and related statutes, to wit, the Jones Act, the Suits in Admiralty Act, the Public Vessels Act, were held to constitute, *not Statutes of limitations* which would be tolled during legal disability or for fraud, but substantive conditions to the exercise of the rights created by the statutes, which are not affected by legal disabilities or fraud.

B. As distinguished from the Federal Employers Liability Act and related acts, referred to above, however, the period of limitations set forth in the Federal Tort Claims Act is a *statute of limitations* rather than a substantive condition. The time limitation provision of the Tort Claims Act when enacted was expressly entitled by its codifiers "Statute of Limitations" (28 U. S. C., 1946 ed., 942), and it has been designated a statute of limitations rather than a substantive condition in *Sweet v. United States,* 71 Fed. Supp. 863, 864, and in *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869, at 873, wherein the court stated (p. 873):

> "As was well said by Judge Yankwich in *Sweet v. United States,* D. C., 71 F. Supp. 863, 864, answer-

ing the argument that the language of 410 (a) of the act incorporated the one year limitation on actions for tort of the California law: 'The sovereign having waived immunity, this clause, without anything else, might possibly be construed to mean that the state statute would apply. But the Congress specifically enacted section 420, 28 U. S. C. A. sec. 942, which the codifiers entitled *"Statute of Limitations."* ' . . . And we think it makes no difference that the limitation applicable to the action for death by wrongful act is held under state law to be a condition on the exercise of the right rather than a limitation on the remedy. This holding is based upon the narrow ground that the limitation is imposed by the statute creating the cause of action[2] and is, to say the best of it, technical and legalistic reasoning, which is not followed in all the states. ([2]It may be observed that the limitations in the Tort Claims Act is also imposed by the statute creating the cause of action; and *if importance is to be attached to this distinction*, it is a reasonable assumption that Congress intended the condition created by its own act to apply rather than one relating to the same subject matter contained in the State law.)" (Emphasis added.)

Thus, under the federal cases the Federal Tort Claims Act is to be differentiated from the Federal Employers Liability Act and related acts in that the time for bringing suit under the former is a statute of limitations and the time for bringing suit under the latter is a substantive condition. Therefore, the period of limitations is tolled during legal disability under the Tort Claims Act but not under the other acts named.

C. An important reason for this distinction between the Federal Tort Claims Act and the Federal Employers Liability Act and related statutes is indicated in the cases

cited above holding the time limitations of the latter acts are substantive conditions rather than statutes of limitations. These cases state as a basis for their holdings that said statutes created new rights unknown to the common law. This, however, is not true of the Federal Tort Claims Act. The substantive right made available to plaintiffs by that act is simply the old common law right of action for negligence. True, the sovereign could not be sued for negligence at common law, but this freedom from suit was merely an immunity on the part of the sovereign constituting a defense to the common law action. The common law right of suit for negligence continued to exist subject to a defense of immunity on the part of the sovereign. This defense could be waived by the sovereign and has in fact been waived by the United States through the Federal Tort Claims Act *(Cerri v. United States,* 80 Fed. Supp. 831 at 833; *Sweet v. United States,* 71 Fed. Supp. 863, 864), thereby leaving plaintiffs free to assert their basic common law cause of action. The Tort Claims Act does not create a new kind of action; it does not create a cause of action at all; it merely waives the government's defense of immunity to suit.

1. That the basic cause of action under the Tort Claims Act is a common law cause of action is made clear by the provision of the act that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) This clause, of course, does not mean that the statute of limitations of the State wherein the tort occurred is to apply to suits brought pursuant to the act, and in fact the courts have expressly held that the clause does not have that effect

(Maryland v. United States, 165 F. 2d 869; *Sweet v. United States,* 71 Fed. Supp. 864), but the clause does indicate that the cause of action which a plaintiff asserts against the government under the Tort Claims Act is simply the same common law cause of action that is asserted against private persons. *(United States v. Campbell,* 172 F. 2d 500 at 503; *Cerri v. United States,* 80 Fed. Supp. 831 at 833.)

D. Serious doubt has been cast upon the entire doctrine that the time limitations contained in the Federal Employers Liability Act and related statutes are unaffected by legal disability or fraud, and several exceptions have been made which are not consistent with the rule. *(Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253; *Osbourne v. United States,* 164 F. 2d 767; *Frabutt v. New York C. & St. L. R. Co.,* 84 Fed. Supp. 460; See *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869.)

1. In the *Scarborough* case the court held the time period of the Federal Employers Liability Act was suspended during the period that plaintiff was prevented from bringing suit by the fraud of the defendant. In the *Osbourne* and *Frabutt* cases the court held the time limitations was suspended during the period that plaintiff was prevented by war from bringing suit.

2. These exceptions to the rule and doubts as to its ultimate soundness have grown out of the extreme inequity of the doctrine, its technical nature, and the failure of the courts following it to give full and serious consideration to the logic and fairness of its application. As stated by the Court of Appeals for the 4th circuit in *Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253, at 258-259, in reversing the District Court which had refused to

suspend the time period of the Employers Liability Act during the period plaintiff was prevented from bringing suit by the fraud of the defendant:

> "We have endeavored to set out fairly the law with which we are here concerned, as it has been stated in the cases decided by the courts. If dicta be considered, the weight of such primary authority appears to favor the view expressed by the District Court. In none of these cases, does the opinion fairly face, with an adequate discussion of the question on principle, the precise problem now before us. The cases cited as favoring the appellee based their holdings on *the narrow technical distinction between the two types of statutes of limitations* and then state baldly that, by virtue of this legalistic distinction, fraud does not toll the running of a statute of limitations which is of the substantive type. Under these circumstances, we do not consider ourselves bound by this seeming weight of judicial authority. We accordingly, feel free to decide this case on principle. . . .
>
> "The decisions in the *Osbourne* and *Frabutt* cases, *supra,* show clearly that *there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases cited, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances.* True it is that war physically prevents access to the courts, however anxious a litigant may be to bring suit. Fraud, however, as in the instant case, may be equally as effective in preventing one from seasonably suing on his claim. . . .
>
> "Judge Frank in the *Osbourne* case and Judge Parker in the *Burkhardt* case [*Maryland to the use of*

Burkhardt v. United States, 165 F. 2d 869], *supra,* have shown that *the distinction between a remedial statute of limitations and a substantive statute of limitations is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe.* Each type of statute, after all, still falls into the category of a statute of limitations. And this is none the less true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. There is no inherent magic in these words." (Emphasis added.)

3. According to the above quotation the time period for bringing an action, whether it be a true statute of limitations or a substantive condition, should be suspended during the period that plaintiff is prevented from bringing suit without fault on his part. Surely infancy may offer as effective a bar to suit as fraud on the part of defendant or the exigencies of war. An infant is legally barred by reason of his infancy from bringing suit. Defendant has argued that the infant may sue by next of friend. But he may have no next of friend. The rule established by the Court of Appeals in this case will be applicable to all infants in all situations. It will apply to a new born baby whose parents are dead, to children of tender years who are abandoned, to children whose parents are too ignorant and uninformed to protect the rights of their children. It will apply also to insane persons without friends or kin confined in mental institutions. In such situations the person under disability is as effectively prevented from bringing suit as a person who is held a prisoner of war or who is misled by misrepresentations. To bar such persons permanently from bringing suit before termination

of their disability is discrimination so shocking that such an intention should not be attributed to Congress if it can reasonably be avoided.

4. In the present case the following facts are all undisputed: Plaintiff is a colored boy who suffered alleged injuries at the time of his birth, December 5, 1949, in a naval hospital in Seattle, Washington. [R. 18-20, 52, 54.] His father was in the armed forces at the time and shortly after plaintiff's birth was sent to Korea where he was killed in action. [R. 73.] His mother who was 22 years old at the time of his birth had attended school only through the seventh grade. [Deposition of Ida Mae Glenn, taken by defendant Nov. 22, 1954, pp. 3, 6.] Under these circumstances certainly it may be reasonably said that this boy could not effectively bring suit for his injuries within two years after the occurrence of the alleged injuries. The District Court expressly found the plaintiff is a person under a legal disability by reason of his minority [R. 73] and that his guardian is not barred from bringing the action by the two-year period of section 2401(b). [R. 74.] Under the principles enunciated in the *Scarborough* case the trial court at least should have discretion to find that, by reason of his extreme infancy and the other circumstances of the case, plaintiff was in effect prevented from bringing suit within the statutory period without fault on his part and that the period of limitations was therefore tolled. So long as it has a reasonable basis in fact this exercise of discretion should not be disturbed by an appellate court.

III.

Ambiguities and Omissions in the Opinion of the Court of Appeals.

A. It cannot be clearly determined from the majority opinion of the Court of Appeals what is the basis for the holding that the disability provisions of U. S. C. section 2401 does not apply to actions in tort against the government. The opinion states that "it is not clear that the sentence in (a) qualified the limitation on tort claims set forth in (b)" and that therefore other indications of Congressional intention must be looked to. The only indications of Congressional intention to which the opinion refers, however, are that "there is no presumption that by a revision which lifts two limitation clauses out of respective context, rewords them a little, and sets them down with separate sublettering in a separate limitations section that the whole of the two were intended to be commingled," that "there is no committee report and no Congressional colloquy or debate that sustains the position of plaintiff-appellee," and that "the reviser's notes which purported to pinpoint substantial changes in the judicial code are silent on any intent to have any tolling provision wash into the Federal Tort Claims Act." The sum and substance of these statements is that there is no substantial evidence of Congressional intention other than the statute itself. The court in effect says: "The meaning of the statute is not clear therefore we must look to other evidence of Congressional intent. There is little or no other evidence of Congressional intent, therefore we hold that the disability provision of subsection (a) does not apply to subsection (b)." This conclusion does not follow from the prior statements. In the absence of more definite evidence of Congressional intention, the Court must return to the language of the statute itself

and determine what is the proper interpretation of the actual language used. This the Court has expressly refused to do.

B. The opinion does not consider the fact that the new section 2401 does not consist merely of the old sections placed together in one location, but that on the contrary section 2401 contains new language which differs in material respects from the language of the old sections. In particular, the wording of subsection (a) of 2401 provides for tolling of the statute of limitations during disability on *all actions* brought against the government *whether contract or tort* as distinguished from the old section 4120 which applied only to contract actions.

C. The opinion does not give consideration to the fact that subdivisions (a) and (b) are but component parts of a single section which must be construed together as a unit rather than as if each subsection was a section separate unto itself.

D. The opinion does not consider the fact that the reviser's notes under section 2401 make specific reference to the notes under section 2501, which section contains similar provisions with regard to actions brought in the Court of Claims, and that the notes under section 2501 state in part: "The revised language will cover all legal disabilities actually barring suit . . . Also persons, under legal disability could not sue, and their suits should not be barred until they become able to sue," which statement offers specific evidence of a policy not to bar from suit persons under a disability.

E. The opinion does not consider in any way the meaning or effect upon the question presented of section 2674 which provides that "The United States shall be liable, respecting the provisions of this title relating to tort

claims, in the same manner and to the same extent as a private individual under like circumstances." Since the statute of limitations on tort claims against private individuals is ordinarily tolled during the disability of the plaintiff, this section indicates an intention on the part of Congress to have a similar policy apply with regard to the government.

F. Finally, the opinion does not discuss in any manner plaintiff's appellee's contention, set forth herein under II, that under the decisions of the Federal Courts, including cases against the government, a statute of limitations, as distinguished from a substantive condition, is ordinarily tolled during disability or fraud of the plaintiff, even in the absence of an express provision to this effect. In particular, the opinion gives no consideration to the case of *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253 at 258-9 holding that the period for bringing suit under the Federal Employers Liability Act is tolled by fraud even in the absence of an express provision to this effect and stating that the "infinite variety" of human experience would disclose other circumstances which would justify tolling the time limitation for bringing suit even in the absence of an express provision in the statute.

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be granted.

JEROME L. YESKO,
Attorney for Petitioner.

SAMUEL A. ROSENTHAL,
NORMAN WARREN ALSCHULER, and
LEONARD G. RATNER,
Of the California Bar,
Of Counsel.

APPENDIX.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellant, vs. Michael Glenn, a minor, by and through his guardian *ad litem,* Ida Mae Glenn, Appellee. No. 14860.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this Cause be, and hereby is reversed.

(Endorsed) Judgment.

Filed and Entered: March 20, 1956.

PAUL P. O'BRIEN, Clerk.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellant, vs. Michael Glenn, a minor, by and through his guardian *ad litem*, Ida Mae Glenn, Appellee. No. 14,860, Mar. 20, 1956.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, ORR and CHAMBERS, *Circuit Judges.*

CHAMBERS, *Circuit Judge:*

Michael Glenn was injured at birth when he was born on December 5, 1949, at the United States Naval Air Station Hospital at Seattle, Washington. Someone was careless. He was dropped on the floor, suffered a head injury and apparently will bear the burden of the injury for life.

On November 12, 1953, the minor by his mother as guardian, sued the United States under the Federal Tort claims Act.[1] In the lapse of four years, witnesses had scattered and records had become sparse. The plaintiff's guardian was hard put to prove her ward's case and the government seems to have been in no position to find witnesses to make a good defense. In this situation the parties stipulated to a judgment for $7,500 against the United States if the plaintiff could survive the government's defense of the statute of limitations.

The limitations provision involved is found in 28 U. S. C. A. 2401 as follows:

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[1]Originally enacted in 1946, 60 Stat. 842. See 28 U. S. C. A. §2671 *et seq.*

"Time for commencing action against the United States.

"(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

"(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

The question is whether 28 U. S. C. A. 2401 (b) is qualified by the second sentence of 2401 (a) or does that sentence only qualify the first sentence of 2401 (a), the sentence, to repeat, being as follows:

"The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

The district court in a very able and scholarly opinion held the sentence to sweep up and down, or backward and

forward.[2] Therefore, it ruled that plaintiff's claim filed almost four years after the event of the injury was not barred. The thesis of the trial judge was that the meaning of the statute, *i.e.* running both ways, was so clear that examination of legislative history of Section 2401 was foreclosed.

If the meaning of the section was as clear as the district court thought, then the conclusion of tolling is possible. But this court takes a different view. The decision of the district judge does not give proper weight to sentence arrangement, paragraphing and numbering. If one is restricted to reading the section alone, this court is more inclined to the view that it is clear, due to arrangement of everything within the section, that there is no license to carry the tolling sentence in (a) out of (a) over into (b). The trial court's construction would read the section as if the second sentence of (a) were taken out of context and set up as (c) following (b).

This court does not choose to place its decision on the ground that it is clear beyond argument that (b) is not qualified by the tolling sentence (a). But it is here held that it is not clear that the sentence in (a) qualified the limitation on tort claims set forth in (b).

In this situation, one must look and sniff for Congressional footprints around the statute. The Congressional history must be examined. When that is done, it seems certain that the government's position is correct here.

The subject section is a revision adopted by the Congress in 1948.[3] Section (a), with modification and con-

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[2]Glenn v. United States, 129 F. Supp. 914.

[3]62 Stat. 971. In 1949, the one year limitation of 2401 (b) was changed to two years. See 63 Stat. 62.

densation, comes out of the Tucker Act,[4] (cases not involving tort).

Section (b) goes back to the Federal Tort Claims Act, which started with a built-in limitation of one year, without express qualification for legal disability. Later the limitation of one year was extended to two years and again without tolling words to cover disabilities.[5]

Certainly there is no presumption that by a revision which lifts two limitation clauses out of respective context, rewords them a little and sets them down with separate sub-lettering in a separate limitations section, that the whole of the two were intended to be commingled. Here, there is just no clear interdependence.

There is no committee report and no Congressional colloquy or debate that sustains the position of plaintiff-appellee. Likewise, the reviser's notes which purported to pinpoint substantial changes in the judicial code are silent on any intent to have any tolling provision wash into the Federal Tort Claims Act.[6] Therefore, this court holds that 2401 (a) and (b) were primarily a codification of existing law and that any changes are within the sub-sections. The sub-sections are mutually exclusive.

The government voices a strong argument for the desirability of a short limitation on tort claims. In this case, there is found some grist for the argument. Here, as with many personal injuries, a long delay will deprive the government of a decent chance to defend. It is said

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[4]Adopted 1887, 24 Stat. 505. Amended 1911, 36 Stat. 1093.

[5]50 Stat. 842. 63 Stat. 62.

[6]1949 U. S. Cong. Service p. 1248 notes follow. 28 U. S. C. A. §2401, *et seq.*

that contract claims of the Tucker Act are easier to defend. But all this is a policy for the Congress.

Nonetheless, it might not be amiss, if in this court's opinion, this were an evenly balanced case, to take into consideration that historically legislative bodies in waiving sovereign immunity have done so timidly, not venturesomely. The waivers are usually highly circumscribed and an intent to broaden the circle is not to be lightly found.

The holding is that not yet does the disability provision of 2401 (a) reach into 2401 (b), the limitations subsection for Federal Tort Claims.

The judgment is reversed.

STEPHENS, *Circuit Judge*, dissenting.

I do not find myself able to concur in the majority opinion that the trial court committed clear error in holding the disability clause of subdivision (a) inapplicable to subdivision (b) of §2401, Title 28 U. S. C. A.

The revisors of Title 28 of the United States Code undertook to eliminate repetitions and conflicting sections of the code and to that end, sections pertaining to specific factual situations were replaced by sections applying more generally. The subject of limitations was treated under this principle. Thus, they encircled "Every civil action commenced against the United States" by the limitation of six years to begin action. Of course, the revisors were well cognizant of the doctrine that a person with a cause of action should not be deprived of his cause by a limitation running while he could not act. Appropriately, then in the same paragraph which contains the limitation, the revisors diluted the full effect of the limitation by provid-

ing that it would not run during the period of the disability and providing, not the full six years after the disability had been removed, but just half that time.

But it was thought that tort claims against the government were of such a nature as to merit different treatment, and paragraph (b) became a part of the section providing for different limitations, but it did not touch the subject of disability.

I do not read section 2401 as a whole, as completely shutting those under disability from the right to recover compensation for the government's wrong and I do not believe Congress, or the revisors, intended that result.

It was argued that the view I have expressed would lead to an illogical result whereby the one suffering from a disability preventing him from instituting action would have three years after removal of the disability, which is longer than the period others would have to sue. But such result may well be very logical. One recovering from a disability may be under greater handicap in learning as to his rights or in assembling proof with the burden he must bear, than one who is free to act immediately after the injury.

Looking at the problem as a whole, it seems to me, as it seemed to the trial judge, that the plain wording and context of the section supports and requires the holding that one suffering injury by the government's negligence is not deprived of his day in court because, for a specified time, he could not ask for it.

(Endorsed:) Opinion and Dissenting Opinion. Filed Mar. 20, 1956. Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 461

MICHAEL GLENN, a minor, by and through his Guardian Ad Litem, IDA MAE GLENN,
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of California (R. 58-71) is reported at 129 F. Supp. 914. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 2-7) is reported at 231 F. 2d 884.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1956 (R. 92) and a petition for rehearing was denied on May 25, 1956 (R. 93). On August 23, 1956, the time within which to file a petition for a writ of certiorari was extended to October 8, 1956, by order of Mr. Justice Burton. The petition for a writ of certiorari was filed on September 28, 1956. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the two year time limitation on Tort Claims Act suits contained in 28 U.S.C. 2401(b) is tolled by the disability provisions of 28 U.S.C. 2401(a).

STATUTE INVOLVED

28 U.S.C. 2401 provides as follows in pertinent part: *Time for commencing action against United States.*

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
>
> (b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, * * *.

82 U.S.C. 1346 is reprinted in the Appendix, *infra*, pp. 17-18.

STATEMENT

On November 12, 1953, Michael Glenn, petitioner here, acting through his mother and guardian, Ida Mae Glenn, instituted this tort action against the Government in the United States District Court for the Southern District of California, Central Division (R. 3-8). The complaint, as amended, alleged the following:

Plaintiff was born at the United States Naval Air Station Hospital, Seattle, Washington, on December 5, 1949 (R. 4). Previously, the Government, together with its employees at the hospital, had undertaken the prospective delivery of the child and, pursuant to that undertaking, said employees attended the child's birth (R. 4-5).[1] The complaint went on to allege negligence on the part of the Government personnel in prematurely and carelessly using clamps and forceps during the delivery of the child and dropping him to the floor immediately after birth (R. 5-8). As a consequence of these alleged actions, the complaint stated that plaintiff was injured in that he sustained "numerous bruises, abrasions, contusions, and lacerations over and about his head and body, a cerebral involvement, a spastic involvement, cerebral palsy, Little's disease, together with a severe and profound physical and mental shock to his entire nervous system" and that impairment of his faculties and his disabilities were of a permanent nature (R. 5-6). As compensation for the aforementioned injuries, the complaint sought $750,000 in gen-

[1] Mrs. Glenn was the wife of a member of the Armed Forces and therefore qualified for care in a Government hospital.

eral damages plus an amount in special damages, to be computed at the time of trial, which by then might have accrued (R. 8).

On May 6, 1954, the Government answered,[2] denying the allegations of the complaint that there was carelessness or negligence upon its part or on the part of its employees during or after delivery, and denying that the plaintiff had been dropped (R. 23-28). The answer also asserted that the claim was barred by 28 U.S.C. 2401(b) since suit was not instituted within two years after the claim accrued (R. 27).

Subsequent to a pretrial conference, the parties stipulated that the issues for trial were as follows: The alleged negligence of Government medical personnel during and after delivery; whether the child was dropped; whether the alleged negligence caused the injuries complained of; and, the nature, extent and duration of plaintiff's injuries (R. 35-37). Thereafter, an additional stipulation was entered into by the parties and approved by the court, whereby the Government, while still denying negligence or liability on its part, agreed to a partial compromise of the action in order to avoid a lengthy and costly trial on the above issues. (R. 52-57). The stipulation provided that if the court decided that a cause of action was stated in the complaint and that such cause of action was not time barred by 28 U.S.C. 2401(b), judgment might be entered in favor of the plaintiff for $7,500 (R. 55-56). The stipu-

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[2] The District Court had previously denied a motion by the Government to dismiss the complaint on the ground that the action was time barred by the two-year limitation on Tort Claims Act suits contained in 28 U.S.C. 2401(b) (R. 10, 12-13).

lation expressly reserved the appellate rights of either party on the limitations question (R. 56).

On April 19, 1955, the district court, pursuant to a memorandum of decision (R. 58-71), entered judgment for the plaintiff (R. 75-76). The court held that this action was not barred by the two-year limitation on Tort Claims Act suits found in 28 U.S.C. 2401(b), in view of the minority and consequent legal disability of the plaintiff (R. 74). It ruled that plaintiff was covered by the disability provision contained in 28 U.S.C. 2401(a) (*supra,* p. 2), which entitles an individual coming within its purview to three years after the cessation of a disability to institute suit (R. 74). The court reasoned that notwithstanding the independent statutory derivations of 28 U.S.C. 2401(a) and 28 U.S.C. 2401(b), *supra,* p. 2, the 1948 revision and codification of those provisions in the present Judicial Code made the disability provision of Section 2401(a) applicable to the limitations period specified in Section 2401(b) (R. 62-69). Judgment was accordingly entered for the plaintiff in the amount of $7,500 (R. 76).

On appeal, the Court of Appeals for the Ninth Circuit, in a divided decision, reversed (Pet. App. 2-7). The court commented initially that if it were restricted to reading 28 U.S.C. 2401 alone "that it is clear, due to arrangement of everything within the section, that there is no license to carry the tolling sentence in (a) out of (a) over into (b)" (Pet. App. 4). The court then went on to examine the legislative history of 28 U.S.C. 2401, as part of the revised Judicial Code adopted by Congress in 1948 (Pet. App. 4).

Section 2401(a) is derived from the Tucker Act which permitted certain non-tort suits against the Government and contained a disability provision. Section 2401(b), the court indicated, is derived from the Tort Claims Act which contained its own time limitations and did not include a provision tolling that limitation for disability (Pet. App. 5).

The court stated that it could not presume that by a revision which took two separate limitation clauses out of their respective contexts, "rewords them a little and sets them down with separate sub-lettering in a separate limitations section, that the whole of the two were intended to be commingled" (Pet. App. 5). Nothing in the legislative history of the 1948 codification warranted such a commingling and the Reviser's notes which purported to list changes effected by the Code did not signify any purpose to have the Tucker Act disability provision apply to Tort Claims Act suits. (Pet. App. 5.) The court concluded that 2401(a) and (b) were primarily a codification of existing law and that any changes are within the subsections themselves, which are mutually exclusive (Pet. App. 5).

The dissenting judge (Judge Stephens) stated that it was his opinion that, although tort actions against the Government were dealt with separately in 28 U.S.C. 2401(b), the disability provision of 2401(a) should nevertheless be read as applying to such suits (Pet. App. 6-7).

ARGUMENT

1. 28 U.S.C. 2401 contains the limitations provisions of two separate statutes. *Supra,* p. 2. Subsection (a),

in which the disputed disability provision is found, is derived from Section 24 (20) of the Judiciary Act of March 3, 1911, 36 Stat. 1093, which, based on Section 2 of the 1887 Tucker Act, 24 Stat. 505, gave the District Courts concurrent jurisdiction with the Court of Claims in certain non-tort civil actions against the Government. 28 U.S.C. (1946 Ed.) 41 (20). The 1911 Act set a six-year limitation for institution of such suits but provided that in the event of certain enumerated disabilities that period would be extended until three years after the disability had ceased. 28 U.S.C. (1946 Ed.) 41 (20).

28 U.S.C. 2401(b), in turn, is derived from Section 420 of the 1946 Federal Tort Claims Act (60 Stat. 842) which set forth the time limitations on tort actions against the United States under that Act. 28 U.S.C. (1946 Ed.) 942. That section set a one-year limit on such actions (subsequently extended to two years by the Act of April 25, 1949, 63 Stat. 62) but made no provision for a tolling of the limitations period by virtue of any disability.

In 1948, with the enactment of the present Judicial Code, 62 Stat. 869 *et seq.*, the provisions of the 1911 version of the Tucker Act and the provisions of the Tort Claims Act which authorized the District Courts to entertain suits against the United States in their respective categories were grouped together as subsections of Section 1346 of Title 28 and denominated "United States as defendant". See Appendix, *infra*, pp. 17-18. The limitations provisions of these two acts were also grouped together as subsections of Section 2401 of Title 28 and labeled "Time for commencing

action against United States" (*supra*, p. 2). Until the decision of the District Court in the present case, all suggestion of an interdependence of the disparate limitations of 2401(a) and (b) had been rejected by the courts which have held that the disability provision contained in 28 U.S.C. 2401(a) is inapplicable to toll the limitation on tort actions found in 28 U.S.C. 2401(b). *Whalen* v. *United States*, 107 F. Supp. 112 (E.D. Pa.); *Foote, et al* v. *Public Housing Commissioner of the United States*, 107 F. Supp. 270 (W.D. Mich.); *Brereton* v. *United States*, Civil No. 890, S.D. South Dakota, decided February 17, 1955 (not reported).

In our view, the foregoing decisions and the ruling of the Ninth Circuit now before this Court embody the correct construction of 28 U.S.C. 2401. Palpably, the fact that the two different limitation provisions of the Tucker Act and the Tort Claims Act were grouped together, for convenience, as different parts of one section of the 1948 Code did not manifest a Congressional purpose that the disability provision of the former was now to apply to tort claims litigation. Mere separation of portions of old statutes and regrouping them for convenience in code form does not effect a change in the law. *Buck Stove Co.* v. *Vickers*, 226 U.S. 205, 213; *Hyde* v. *United States*, 225 U.S. 347, 361. Nor is the law varied by alterations in phraseology where such modifications are intended merely to restate pre-existing law in different terms or in a simplified form. See *United States* v. *Lacher*, 134 U.S. 624, 626; *Holmgren* v. *United States*, 217 U.S. 509, 519-520; *Anderson* v. *Pacific Coast S.S. Co.*, 225

U.S. 187, 199, 202-203; cf. *United States* v. *Grainger,* 346 U.S. 235, 247-248. The structure and terms of 28 U.S.C. 2401, as well as the Reviser's comments on the general scope of the 1948 revision, show that we are dealing with changes of that sort in this case.

2. 28 U.S.C. 2401, as indicated, follows the pattern set by 28 U.S.C. 1346 (*infra,* pp. 17-18)—granting jurisdiction to the District Courts to hear suits against the United States—in that it collocates parallel provisions of the 1911 form of the Tucker Act and of the Tort Claims Act as separate subsections of a common section with a convenient reference denominator. The pre-existing independence of those provisions is preserved. This is attested to by numerous factors, not the least of which is the utilization of separate subsections, each dealing with different categories of actions and each setting up different time limitations. This separateness is underscored by the language of Section 2401(b) which states boldly and without any reference to Section 2401(a), with its six-year time limitation and its three-year disability provisions, that "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *" (*supra,* p. 2).

As pointed out by the Court of Appeals (Pet. App. 5), there is nothing in the legislative history of this portion of the codification which even suggests that the disability provision of Section 2401(a) was designed to apply to Section 2401(b). Nor is there any indication of such applicability in the exhaustive Reviser's Notes. Indeed, those notes emphasize the mutual exclusiveness of the subsections, stating that Sec-

tion 2401(a) relates to the "time limitation for bringing actions against the United States under section 1346(a) of this title", which explicitly excludes tort actions (*infra*, p. 17), and that "Subsection (b) of the revised section simplifies and restates said section 942 [limiting tort actions against the Government in the former 28 U.S.C.] *without change of substance*" (emphasis added). See Report No. 308, House Committee on Judiciary, 80th Congress, 1st Sess., p. A. 185.[3]

Petitioner relies heavily upon the fact that the disability provision of the 1911 Act was revised in Section 2401(a) of the 1948 codification to open with the phrase "[t]he action of any person under legal disability" and makes that linguistic change a prime basis for urging that Section 2401(a) be accorded general applicability. Apart from the fact that the structure of

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[3] In the *Judicial Code—1948 Revision*, 8 F.R.D. 439, William W. Barron, the Chief Reviser of Title 28, relates (8 F.R.D. at 441):

> There was no purpose on the part of the Revision staff to effect any change in existing law. Despite this, the process of comprehensively examining and rewriting the Code disclosed some grave disparities, inconsistencies and ambiguities not correctable by mere codification * * *. The Reviser and the Advisory Committee, upon discovering situations which would not yield to codification, felt in duty bound to apprise Congress of their findings and recommendations. Consequently a few such changes, substantive in nature, were recommended to Congress. These were carefully outlined in the Reviser's Notes, and fully considered by the Judiciary Committees of both houses * * *.

Thereafter, the article goes on to discuss the nature of those substantive changes. No mention is made of any such changes effected by 28 U.S.C. 2401. See also *ibid.* at pp. 445-446.

Section 2401, as well as the particular language of Section 2401(b), bely such applicability, the language of the provision prior to 1948, read in the light of the authoritative Reviser's commentaries on the 1948 version, makes it clear that those prefatory words were not intended to have the overriding effect ascribed by petitioner. Rather, they related, in a revised and simplified form, solely to the preceding sentence of Section 2401(a) which sets limitations on District Court Tucker Act suits. Thus, the Reviser's note following 28 U.S.C. 2501, to which we are referred by Section 2401, and upon which petitioner relies (Pet. 9), states that this phrase was:

> * * * substituted for "married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued; entitled to the claim." The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use *of the general language substituted.* [Emphasis added]

It is apparent that "the general language substituted" was not intended to extend the scope of the disability provision of Section 2401(a) beyond those non-tort causes of action previously covered in Section 24 (20) of the 1911 Act and now covered by 28 U.S.C. 1346(a), *infra,* p. 17. Rather, as applied in Tucker Act suits, the new general phrase was designed to obviate reference to specific disabilities, and to

bring the disability provision into tune with what modern law considers to be a disabling legal status.

It is significant, moreover, that the disability provision of Section 2401(a) permits a three-year period for actions after cessation of the disability. This is less than the six-year period for institution of suits allowed by this subsection to persons under no disability. However, this three-year period is *greater* than the two-year period allowed for institution of tort suits by Section 2401(b), and indeed when Section 2401(b) first became law only one year was permitted for institution of tort claims. 60 Stat. 842. Thus, if the disability provision of Section 2401(a) were to be applied to Section 2401(b), we would have the anomolous situation of a tort claimant having a longer period of time to institute suit *after* his disability was removed than he would have had if he had not been under a disability. Such a result would be unique in the limitations field and flies in the face of the rationale of disability exceptions to statutes of limitations.[4]

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[4] Nor does the relative placement of the subsections of 28 U.S.C. 2401 indicate the creation of such a situation. If the disability provision of Section 2401(a) were intended to apply to 2401(b), the logical method would not have been to place it in 2401(a) without any reference to tort actions, as was done here, but rather to place it either at the end of Section 2401(b) with a reference to both subsections, or in a separate subsection following both Sections 2401(a) and (b). The latter technique, it should be noted, was precisely the one followed by Congress in providing that the set-off and counterclaim provision of the 1911 Act was to apply both to Tucker Act suits under 28 U.S.C. 1346(a) and to Tort Claims Act suits under 28 U.S.C. 1346(b). See 28 U.S.C. 1346 (c), *infra*, p. 18.

3. It is significant, we believe, that in every other statute dealing with Governmental or private tort liability, and the time limitations thereon, Congress has not seen fit to include a disability provision. Neither the Suits in Admiralty Act, 47 Stat. 420, 46 U.S.C. 745; the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 782; the Jones Act, 41 Stat. 1007, 46 U.S.C. 688; the Carriage of Goods by Sea Act, 49 Stat. 1207, 1208; nor even the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. 56, contain disability provisions. Moreover, the courts have rejected attempts judicially to engraft those acts with disability extensions. See *Sgambati* v. *United States,* 172 F. 2d 297 (C.A. 2), certiorari denied, 337 U.S. 938; *Williams, et al.* v. *United States, et al.,* 228 F. 2d 129 (C.A. 4), certiorari denied, 351 U.S. 986; *Kalil* v. *United States,* 107 F. Supp. 966, 967 (E.D. N.Y.); *Wahlgren* v. *Standard Oil Co. of N. J.,* 42 F. Supp. 992, 993 (S.D. N.Y.).[5]

Two courts have recognized narrow exceptions. In *Osbourne* v. *United States,* 164 F. 2d 767, the Second Circuit held that there is one exception to the

[5] The foregoing cases all deal with actions brought under the Suits in Admiralty Act, Public Vessels Act, or Jones Act. The following cases, construing the limitations provisions of the Federal Employers Liability Act, have denied disability extensions for any reason. *Damiano* v. *Penn. R. Co.,* 161 F. 2d 534 (C.A. 3), certiorari denied, 332 U.S. 762; *Bell* v. *Wabash Ry. Co.,* 58 F. 2d 569 (C.A. 8); *Frabutt* v. *New York, C. & St. L. R. Co.,* 84 F. Supp. 460 (W.D. Pa.); *Alvarado* v. *Southern Pac. Co.* (Tex. Civ. App.) 193 S.W. 1108; *Jordan* v. *Baltimore and Ohio R. Co.,* 135 W. Va. 183, 62 S.E. 2d 806; *Wichita Falls & S.R. Co.* v. *Durham,* 132 Tex. 143, 120 S.W. 2d 803; *Wade* v. *Franklin,* 51 Ohio App. 318, 200 N.E. 644; *Gauthier* v. *Atchison, T. & S. F. Ry. Co.,* 176 Wis. 245, 186 N.W. 619; *Bement* v. *Grand Rapids & Ind. Ry. Co.,* 194 Mich. 64, 160 N.W. 424.

rule that, in the absence of a specific disability provision, the limitation period in these statutes will not be tolled, and that is where there is physical impossibility of access to the courts such as might happen in wartime to foreigners, enemy aliens, or our own personnel who are prisoners of war. 164 F. 2d 767, 768-769. However, *Osbourne* recognized that no such disability extensions can be judicially created for infancy. 164 F. 2d 767, 768. In *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253, certiorari denied, 339 U.S. 919, the Fourth Circuit held, in a suit under the F.E.L.A., that the limitations period would be tolled because the defendant fraudulently induced plaintiff not to sue.

Petitioner, relying principally upon *Scarborough*, asserts that disability exceptions should be read into the Tort Claims Act. Putting to one side the question of whether *Osbourne* and *Scarborough* were correctly decided,[6] the Fourth Circuit itself, in a recent decision, has indicated where it will draw the line in these cases. In *Williams, et al.* v. *United States, et al.*, 228 F. 2d 129 (C.A. 4), certiorari denied, 351 U.S. 986, that court was faced with the contention that insanity tolled the two-year limitation of the Suits in Admiralty Act. In affirming the District Court's rejection of that proposition (133 F. Supp. 317), the Fourth Circuit stated (228 F. 2d at 132):

> * * * The statute contains no saving clauses for disability of any kind. *Sgambati* v. *United States*, 172 F. 2d 297, certiorari denied 337 U.S. 938 * * *.

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[6] The Fourth Circuit recognized that its decision in *Scarborough* was against the weight of authority. 178 F. 2d 257-258.

> Two exceptions to the rigid prevailing rule, that such statutes of limitations cannot be extended under any circumstances, have been carved out by our courts; in the prisoner of war situation, *Osbourne* v. *United States,* 2 Cir., 164 F. 2d 767; and in the fraud situation, *Scarborough* v. *Atlantic Coast Line R. Co.,* 4 Cir., 178 F. 2d 253 * * * certiorari denied 339 U.S. 919 * * *. We are unimpressed with the argument that insanity likewise should toll this Statute of Limitations and we expressly hold that it does not. See, to like effect, *Kalil* v. *United States,* D.C., 107 F. Supp. 966, and also Judge Bryan's reasoning, 133 F. Supp. 318-319.[7]

Accordingly, no sound basis exists for departing from previously established law. In the absence of an express disability provision, limitations on Tort Claims Act suits against the Government may not be tolled for infancy.[8]

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[7] The District Court's opinion in *Williams* (133 F. Supp. 317) makes the following observation (at p. 319):

> * * * An additional factor active here, but not present in the *Scarborough* case, is the immunity of the United States to suit. It holds the claimant to strict compliance with the very terms of the exceptive statute. The rigidity of the immunity is relaxed during the two years only. Indulgences for infancy or insanity are not a matter of right; nor does their absence invalidate the statute. *Vance* v. *Vance,* 1883, 108 U.S. 514, 521 * * *. Congress advisedly grants or withholds these tolerances. As witness: Additional time for these contingencies is not accorded by the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, but it is allowed plaintiffs in the Court of Claims. 28 U.S.C. §§ 2404, 2501.

[8] Petitioner attempts to characterize the limitations in the Tort Claims Act as procedural rather than substantive and argues therefrom that being procedural they are subject to implied ex-

CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari be denied.

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ceptions (Pet. 11-17). Whatever validity this argument may have in other areas, the limitations of the Tort Claims Act are clearly jurisdictional and accordingly are not subject to implied exceptions, extensions, or waivers. *Anderegg* v. *United States*, 171 F. 2d 127, 128 (C.A. 4), certiorari denied, 336 U.S. 967. See also *Munro* v. *United States*, 303 U.S. 36, 41; *Finn* v. *United States*, 123 U.S. 227.

APPENDIX

28 U.S.C. 1346 provides:

§ 1346. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws * * *;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the

claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

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